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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 BROOK S. EASTMAN DUNIVIN,

9 Plaintiff,

10 v.

11 MICHAEL J. ASTRUE,

12 Defendant.

CASE NO. C11-5804 BHS

ORDER ADOPTING IN PART
AND DECLINING TO ADOPT
IN PART REPORT AND
RECOMMENDATION AND
REMANDING FOR FURTHER
PROCEEDINGS

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14 This matter comes before the Court on the Report and Recommendation (“R&R”)
15 of the Honorable J. Richard Creatura, United States Magistrate Judge (Dkt. 23), and
16 Defendant’s objections to the R&R (Dkt. 24).

17 **I. PROCEDURAL HISTORY**

18 On October 10, 2011, Brook S. Eastman Dunivin (“Dunivin”) filed a complaint
19 requesting judicial review of an administrative law judge’s (“ALJ”) decision that Dunivin
20 was not disabled for the time period of March 31, 2005 through May 6, 2009, the date of
21 the ALJ’s decision. Dkt. 3. On August 20, 2012, Magistrate Judge Creatura issued an
22 R&R recommending that the Court adopt the ALJ’s decision. Dkt. 23. On September 4,

2012, Dunivin filed objections to the R&R, seeking a reversal of the Magistrate Judge's decision or, in the alternative, remand of the case to the ALJ for further proceedings. Dkt. 24. On September 10, 2012, the Defendant filed a response (Dkt. 25), resting on his opening brief (Dkt. 16).

II. DISCUSSION

A district judge "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made" and "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636 (b)(1)(B). In this case, Dunivin objects to multiple portions of the R&R, which are addressed below.

A. Terille Wingate, Ph.D's Opinion

Dunivin argues that the Magistrate Judge erred because he (1) affirmed the ALJ's improper rejection of Dr. Wingate's opinions regarding whether she was markedly limited in her ability to respond to stress as well as those opinions based on her self-report, and (2) by finding the ALJ incorporated the moderate limitations assessed by Dr. Wingate in his decision. Dkt. 24 at 1-7.

On September 10, 2008, Dr. Wingate examined Dunivin and conducted a mental status examination ("MSE"). Tr. 351-60. Dr. Wingate offered her opinions regarding Dunivin's impairments and her function limitations. *Id.* The ALJ concluded the following regarding Dr. Wingate's opinions of Dunivin's limitations:

I assign some weight to the opinion of Dr. Wingate, who opined that the claimant had mostly mild and moderate functional limitations. However, I do not accept her conclusion that the claimant is markedly

1 limited in the ability to respond appropriately to and tolerate the pressure
2 and expectations of a normal work setting [cite omitted]. This was based on
3 the claimant's self-report, which suggested she had marked anxiety.
4 However, the progress notes from the claimant's counselor from the same
month indicate the claimant's anxiety was moderate and related to family
issues[citations omitted]. Situational issues are not medically determinable
impairments.

5 Tr. 41.

6 Dunivin argues that the Magistrate Judge erred when he recommended that
7 the Court affirm the ALJ's decision to reject Dr. Wingate's opinion that Dunivin had
8 "marked" limitation in her ability to respond appropriately to and tolerate the pressure
9 and expectations of a normal work setting. Dkt. 24 at 1-4. Dunivin argues that the ALJ
10 improperly rejected Dr. Wingate's opinion because it was based on "plaintiff's self-
11 report." Dkt. 24 at 4. Dunivin asserts that "a review of Dr. Wingate's opinion indicates
12 that it was based on her clinical interview, mental status examination and testing." Tr.
13 351-55. Upon review of the record, the Court agrees with Dunivin. Additionally,
14 consideration of a claimant's own description of her mental impairments by a mental
15 health professional as "symptoms" comports with Social Security regulations. *See* 20
16 C.F.R. §§ 404.1527, 416.927.¹

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21 ¹ *See also Ryan v. Commissioner*, 528 F.3d 1194, 1199-2000 (9th Cir. 2008)(holding that
22 an ALJ does not provide clear and convincing reasons for rejecting an examining physician's
opinion by questioning the credibility of the patient's complaint where the doctor does not
discredit those complaints and supported her ultimate opinion with her own observations).

1 Dunivin argues that there is no inconsistency between Dr. Wingate's findings and
 2 the note from by her mental health counselor, Helgi Douay,² from the same month that
 3 dealt only with family issues and her finding that Dunivin's anxiety was moderate. Dkt.
 4 24 at 2. Dunivin contends that the focus of the treatment that particular day was family
 5 relationships. *Id.* The record reads: "Brook is seen for follow-up individual
 6 psychotherapy in the treatment of issues with depression, anxiety, ADHD and conflicts
 7 within primary relationships." Tr. 414. The treatment notes do indicate that Dunivin and
 8 Douay discussed family relationships that day, which does not mean that the "salient
 9 symptoms present" that day, moderate depression, anxiety, and negative cognition, were
 10 solely attributable only to family relationships. *See id.* However, given the remainder of
 11 the notes memorializing a discussion about Dunivin's relationship with her grandmother
 12 and aunt and the necessity for "Brook to individuate herself from very strong-willed
 13 women in the family," it appears that the treatment that particular day was focused on
 14 what Douay termed Dunivin's "longstanding issue" with "other family members." *Id.*

15 Upon review of the record, the Court finds that a single treatment note,
 16 demonstrating that particular treatment session was focused on long-standing family
 17 issues and indicating that Dunivin's anxiety, depression and negative cognition were
 18 moderate that day, does not undermine the examining physician Dr. Wingate's opinion
 19 that Dunivin had overall marked limitations in her ability to respond appropriately and

21 ² Notably, the ALJ finds that Douay is "not an acceptable medical source as defined
 22 within the regulations." Tr at 41. This finding from the ALJ further supports this Court's
 determination that a single chart note from Douay should not undermine Dr. Wingate's opinions
 on Dunivin's limitations.

1 tolerate pressure and expectations of a normal work setting. The ALJ did not fully
2 account for the context of the materials or all the parts of the testimony and reports. *See*
3 *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998) (an ALJ cannot justify a decision by
4 not fully accounting for the context of the materials or all parts of the testimony and
5 reports). The Court declines to adopt the R&R on this issue and remands for additional
6 consideration of Dr. Wingate's opinions on Dunivin's marked limitations within the
7 context of the record as a whole.

8 Dunivin also argues that the ALJ erred in rejecting without explanation the
9 moderate limitations assessed by Dr. Wingate, and the Magistrate Judge recommended
10 finding that Dr. Wingate's assessment was incorporated into the ALJ's finding, when it
11 was not. Dkt. 25 at 5. The Defendant argues, and the Magistrate Judge found, the ALJ
12 accounted for Dr. Wingate's opinion in his assessment of Dunivin's residual functional
13 capacity and that assessment was not inconsistent with Dr. Wingate's assessment of
14 Dunivin's moderate limitations, "therefore there was no need for the ALJ to provide
15 reasons for rejecting them." Dkt. 20 at 7. However, the Court finds that while the ALJ
16 may have considered Dr. Wingate's opinions, the functional residual capacity assessment
17 is not fully consistent with Dr. Wingate's assessment and it is not clear why the ALJ
18 rejected Dr. Wingate's opinions regarding Dunivin's moderate limitations. As Dunivin
19 correctly observes,

20 Dr. Wingate opined that Plaintiff had moderate limitations (defined as a
21 significant interference with basic work activities) in her ability to learn
22 new tasks, perform routine tasks and understand, remember and follow
complex instruction and exercise judgment and make decisions. (AR 353).

1 Yet, the ALJ found that Plaintiff could perform simple and repetitive tasks
2 and some detailed and complex tasks.

3 Dkt. 24 at 5. The Court declines to adopt the R&R on this issue and remands for the ALJ
4 to consider Dr. Wingate's assessment of Dunivin's moderate limitations within the
5 context of the record as a whole.

6 **B. Psychological Testing**

7 Dunivin claims that the Magistrate Judge erred by providing an impermissible post
8 hoc rationalization for the ALJ's failure to address Dunivin's performance on the
9 Integrated Visual and Auditory Continuance Performance Test (IVA+CFT) administered
10 on April 11, 2006. Dkt. 24 at 6.

11 The Magistrate Judge found that the ALJ's failure to discuss the report was not
12 harmful error because the report did not contain specific probative evidence. Dkt. 23 at
13 20-21. Magistrate Judge Creatura quoted a portion of the IVA+CFT report cited directly
14 below and then concluded that the ALJ did not commit harmful error:

15 The report provides possible suggestions and hypotheses for the
16 examiner, but it is not to be construed as prescriptive, definitive or
17 diagnostic. Only 'working' diagnoses are indicated by the test results. . . .
18 Given the complexity of ADHD symptoms and the limitations of a single
19 test, this working diagnosis is inherently limited and may be incorrect. The
20 clinician should review the report in the context of other information such
21 as behavioral rating of attention, behavior, social and educational
22 background, emotional state, physical health, medication effects, recent
environmental stressors, and data from other tests. As with all mental and
performance tests, test conditions an inadequate motivation can
significantly compromise a test's validity. (Tr. 314).

Based on the relevant record, including the test results report as well
as the ALJ's written decision, the Court concludes that the ALJ did not
commit harmful error by failing to discuss this report. There were no
limitations on plaintiff's ability to work opined by a medical source based
on this report and the report standing alone does not compel any such

1 opinion. Therefore, the Court concludes that in the context of the entire
2 record, including plaintiff's entire medical record and the ALJ's written
3 decision, this report regarding the results of plaintiff's Integrated Visual
and Auditory Continuous Performance Test was not significant probative
evidence that the ALJ committed harmful error by failing to discuss.

4 Dkt. 23 at 20-21.

5 The Court agrees with Magistrate Judge Creatura's assessment that the ALJ
6 did not commit harmful error in failing to discuss evidence that was not significant
7 and probative. *See Vincent on Behalf of Vincent v. Heckel*, 739 F.2d 1393,1395-95
8 (1984). Accordingly, the Court adopts the R&R on this issue.

9 **C. State Agency Opinions**

10 Dunivin appears to argue that the Magistrate Judge erred in his recommendation
11 that the ALJ properly relied on the opinions of state agency non-medical consultants, Drs.
12 Eather, Clifford and Regents, when their opinions were from 2006 and did not account
13 for subsequent relevant evidence, including Dr. Wingate's opinion. Dkt. 24 at 7. Dunivin
14 contends that the ALJ inappropriately credited non-examining medical experts' opinions
15 as constituting substantial evidence where it is not consistent with other independent
16 medical evidence in the record. *Id.* at 8 (*citing Tonapetyan v. Halter*, 242 F.3d 1144,
17 1149 (9th Cir. 2001)).

18 In assessing Dunivin's residual functional capacity, the ALJ found:

19 The claimant has no exertional limitations. She can perform simple
20 and repetitive tasks and some detailed and complex tasks. The claimant is
21 capable of two-hour intervals of productive activity through the course of
22 an 8-hour workday. She can interact appropriately with others, but would
have difficulty in a work setting requiring frequent social interaction with
the public, coworkers or supervisors. The claimant can accept supervision
and tolerate limited social contact with co-workers. She can meet basic

1 adaptive needs and travel. The claimant can tolerate and adjust to
2 occasional changes in a work setting.

3 Tr. 38.

4 Because the Court has already found that the functional residual capacity is not
5 fully consistent with Dr. Wingate's assessment and it is not clear why the ALJ rejected
6 Dr. Wingate's opinions regarding Dunivin's moderate limitations and failed to fully
7 consider Dunivin's marked limitations, the Court concludes that a remand for the ALJ to
8 consider more fully Dr. Wingate's opinions along with the State's non-examining
9 medical experts' opinions is appropriate. Depending on what impact, if any, the ALJ
10 finds that Dr. Wingate's opinions may have, his decision could affect the analysis of
11 Dunivin's functional residual capacity. Thus, the Court declines to adopt the R&R on
12 this issue.

13 **D. Appeals Council Evidence**

14 Dunivin argues that the Magistrate Judge erred in not addressing her "arguments
15 regarding evidence submitted to the Appeals Council at Exhibits 17F-22F." Dkt. 24 at 8.
16 However, while the Magistrate Judge does not discuss the Appeals Council exhibits by
17 name, it does appear that he reviewed them, indicating that the new evidence was
18 considered, but that the "new evidence does not demonstrate that the ALJ's written
19 decision is not supported by substantial evidence in the record as a whole." Dkt. 23 at 2.

20 The Defendants argue that the evidence presented to the Appeals Council
21 does not raise the possibility that the outcome of the case would change because (1) "the
22 evidence is duplicative and repetitive of other evidence in the record (*see* Dr. Wingate's

1 records at Tr. 351-360)", (2) the new evidence is brief, broad, conclusory and vague, such
2 that it is not error for the ALJ to reject it, (3) the newly submitted reports were prepared
3 after the ALJ decided the case on May 6, 2009, and did not affect the decision about
4 whether Dunivin was disabled beginning on or before March 31, 2005, and (4) Dunivin
5 has failed to show good cause for failure to incorporate the report earlier. Dkt. 20 at 11-
6 12.

7 The Court agrees with the Defendant that Dunivin has not shown good cause for
8 failing to incorporate this report earlier. Dkt. 20 at 12-13. Dunivin has not provided any
9 explanation as to why these reports or similar reports could not have been obtained prior
10 to the ALJ's decision. Accordingly, this evidence does not provide a basis for the Court
11 to remand this case for further consideration. *See Mays v. Massanari*, 279 F.3d 435, 462-
12 63 (9th Cir. 2001) (plaintiff cannot show good cause by merely obtaining a favorable
13 report after an adverse decision). To the extent the report contains opinions by Dr.
14 Wingate, the Court finds those duplicative of his earlier submitted opinions and has
15 decided to remand the case for further consideration of those earlier opinions. *See supra*.
16 The Court adopts the R&R on this issue.

17 **E. Lay Testimony**

18 Dunivin argues that the ALJ improperly rejected the lay testimony of Dunivin's
19 friend, Dezare Malone. Dkt. 24 at 8-9. The Magistrate Judge found that, based on the
20 relevant record, the ALJ provided germane reasons for his failure to credit fully Ms.
21 Malone's opinions. Dkt. 23 at 24. Namely, the Magistrate Judge affirmed both the
22 ALJ's determination that Ms. Malone's opinion regarding Dunivin's anger and sadness

1 getting worse in September 2005 because it was “not reflected in the medical records”
2 (*id.*), and Dunivin’s problems getting up in the morning were inconsistent with Dunivin’s
3 report to Dr. Price on October 2006:

4 ‘I get up around 6:45 to seven a.m. I take my child to school, come
5 home, make my other child breakfast, watch television with her, try to do
6 laundry but not always successful and then I take her to school I go and
7 visit my grandma while I wait to pick up my child at two p.m. and drive
8 around I mostly run my own errands but usually I have someone with
9 me.’

10 (Tr. 330).

11 The Court agrees with the Magistrate Judge’s conclusion that the ALJ provided
12 germane reasons for his failure to credit fully Ms. Malone’s opinions. Accordingly, the
13 Court adopts the R&R on this issue.

14 **F. Steps Four and Five**

15 Without deciding whether the Magistrate Judge erred in recommending the Court
16 affirm the ALJ’s determinations at steps four and five, consistent with the Court’s
17 analysis above, the Court remands this case to the ALJ for further consideration of Dr.
18 Wingate’s opinions on Dunivin’s moderated and marked limitations which may impact
19 the ALJ’s conclusions at steps four and five.
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III. ORDER

Therefore, it is hereby **ORDERED** that the R&R (Dkt. 23) is **ADOPTED in part** and **DECLINED TO ADOPT in part** and the case is **REMANDED** (Dkt. 24) to the ALJ for further proceedings in accordance with the reasoning set out above.

Dated this 19th day of November, 2012.

A handwritten signature in black ink, appearing to read "Benjamin H. Settle", written over a horizontal line.

BENJAMIN H. SETTLE
United States District Judge